RODRECK MUSIYIWA
versus
ANCHOR YEAST (PVT) LTD

HIGH COURT OF ZIMBABWE
MAWADZEJ
HARARE, 20 March & 29 July 2015

Rescission of Judgement

R Stewart, for the applicant
Ms *I Pasi,* for the respondent

MAWADZEJ: This is an application for rescission of a default judgement entered against the applicant in case number HC 5332/14 on 30 July 2014. The application is in terms of r 63 of the High Court of Zimbabwe Rules 1971.

The background facts of this matter are as follows;

The respondent is a duly registered company in accordance with the laws of Zimbabwe. The applicant was employed by the respondent as the Chief Executive Officer and on 11 January 2013 the applicant resigned. The respondent allegedly opted to pay the applicant for 3 months in *lieu* of notice. The applicant took possession of the respondent's motor vehicle an Isuzu KB300 Registration Number AAW 3636 which was the applicant's company benefit while in the employ of the respondent.

The applicant alleges that he has not been paid for the three months in lieu of notice together with the 90 days cash in lieu of leave and that he was given the free use and enjoyment of the said motor vehicle pending the payment of his terminal benefits. This is disputed by the respondent whose position is that there was no such arrangement and that the applicant lost this company benefit upon resignation.

On 27 June 2014 the respondent issued summons out of this court in HC 53321/14 against the applicant claiming the return of the said motor vehicle, which motor vehicle the respondent

alleged the applicant possessed wrongfully and unlawfully. The summons were served at No. 155 Greendale Avenue Greendale Harare which was the applicant's address of service on 3 July 2014. The copy of the summons and the plaintiff's declaration were served on the said address by affixing them to the outer black letter box at that address after a diligent search. The applicant did not enter an appearance to defend and on 30 July 2014 my sister Chigumba J granted a default judgment.

It is the applicant's case that he had left the residence at No. 155 Greendale Avenue Harare sometime in February 2014 and therefore was not served with the summons. The applicant attached a ZETDC bill annexure D showing that he closed the electricity account at these premises on 10 March 2014. The applicant stated that at the time the summons were served at No 155 Greendale Avenue Harare the applicant had taken residence at No 6 Sunninghill close Glen Lorne Harare and he attached a ZETDC bill in his name dated 12 August 2014 with the same address. The applicant said he had moved to this address in February 2014. I also allowed the production of a Deed of Transfer No. 0004896/13 attached to the applicant's answering affidavit which shows that the applicant had sold the Greendale property to Neutral Freight Services (Pvt) Ltd on 29 October 2013 for US $185 000-00. I believe this was not new evidence at all as the applicant had alleged in the founding affidavit that he had left the Greendale property at the time the summons were served. It is the applicant's contention that he was not served with the summons and therefore was not in willful default.

According to the applicant he only became aware of the default judgement on 13 August 2014.

The applicant contends that he has a *bona fide* defence to the respondent's claim as per an email dated 7 June 2013 the respondent had allegedly admitted not to have settled the applicant's terminal benefits. The applicant alleges that at that time of his resignation he had entered into an agreement with the respondent in which the applicant was to retain the said motor vehicle until the respondent settled the applicant's terminal benefits which according to the applicant far exceed the value of the said motor vehicle. It is the applicant's case that the return of the said motor vehicle as per the agreement between the parties was to be concomitant with the payment of the applicant's terminal benefits. The applicant alleges the respondent has reneged on this agreement by instituting proceedings which resulted in the granting of the default judgement.

The respondent on the other hand submitted that the applicant was in willful default and has not shown good and sufficient cause why the default judgement should be rescinded as the applicant has no bona fide defence to the respondent's vindicatory claim.

According to the respondent the applicant resigned in anticipation of disciplinary proceedings which had been instituted as the applicant had been suspended on 11 January 2013 albeit on full salary. The respondent disputes that it any stage accepted any liability in respect of the applicant's terminal benefits as this was an issue still to be resolved by the parties. According to the respondent the motor vehicle in question was a benefit the applicant was entitled to for as long as he was in the respondent's employ and that the applicant lost this benefit when he resigned. The respondent submitted that at all material times, as per annexure C1 which is an email dated 5 June 2013, it has consistently requested and demanded that the applicant surrenders the said motor vehicle to the respondent. The respondent further submitted that the respondent's claim in respect of the said motor vehicle is based on ownership and is not affected by whatever other claims the applicant may perceive to have against the respondent and that the respondent has not accepted any of the applicant's claims.

The respondent insisted that the applicant was in willful default. According to the respondent annexure D to the applicant's founding affidavit does not show that the applicant had vacated the Greendale property in question as the address of the property in question is not stated on annexure D. The respondent submitted that annexure E would not take applicant's case any further as it was possible for the applicant to own both the Greendale property and the other property in Glen Lorne Harare. The respondent insisted that the applicant was in willful default. The respondent insisted that the applicant was properly served with the summons at the address the applicant provided in his letter of resignation and that this complies with r 39 (2) (b) of the High Court Rules 1971. The respondent submitted that the applicant did not notify the respondent of any change of address.

The respondent stated that it never entered into any agreement with the applicant permitting applicant to remain in possession of the said motor vehicle and that the applicant has failed to provide proof of such an agreement. According to the respondent the applicant has no basis for withholding the said motor vehicle as he has no right of retention or a contractual right permitting him to remain in possession of the respondent's motor vehicle.

The Law

An application of this nature is provided for in r 63 (1) of the High Court Rules 1971. This court may set aside a judgement granted in default if it is satisfied that there is good and sufficient cause to do so. See r 63 (2) of the High Court Rules.

The High Court Rules 1971 do not define the terms "good and sufficient cause" but these terms have been defined in a plethora of cases. See *Songore* v *Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 (S); *Zimbabwe Banking Corporation* v *Masendeke* 1995 (2) ZLR 400 (S); *Chihwayi Enterprises (Pvt) Ltd* v *Atish Investments (Pvt) Ltd* 2007 (2) ZLR 89 (S).

This court enjoys wide discretion in deciding whether to set aside a judgement granted in default. It was held in the case of *Dewards Farm (Pvt) Ltd & Ors* v *Zimbabwe Banking Corporation* Ltd 1998 (1) ZLR 368 (S) that even where there is willful default there may still be good and sufficient cause for granting rescission of judgement. In that case the court alluded to the motive behind the default.

In the case of *Chihwayi Enterprises (Pvt) Ltd* v *Atish Investments (Pvt) Ltd supra* at 95 A-B it was stated with clarity that the terms "sufficient cause" or "good cause" entails that in principle and in the long practice of our courts two elements should be proved which are;

i) that the party seeking the rescission of a judgement must present a reasonable and acceptable explanation for his default and

ii) on the merits such a party must have a *bona fide* defence which, *prima facie* carries some prospects of success.

It is clear that these two requirements are considered conjunctively.

I now proceed to apply these principles to the facts of this case.

The applicant's explanation for the default was that he had vacated the premises at which the summons were served in Greendale Harare and was now staying in Glen Lorne Harare. The applicant has tendered a Deed of Transfer which shows that he had disposed of the Greendale property way before the summons were served. I find that explanation to be reasonable and acceptable. The respondent has not seriously challenged this explanation. It remains very possible that the applicant had vacated the property in Greendale Harare at the time the summons were served. Under those circumstances the applicant cannot be said to be in wilful default. The applicant should be given the benefit of the doubt and is entitled to the indulgence of the court. It

is therefore my finding that the applicant was not in wilful default.

I now proceed to consider whether the applicant has a *bona fide* defence on the merits which carry prospects of success. The question to be answered is whether the applicant has set out averments which if established at trial would entitle the applicant to the relief asked for.

I am not persuaded that the applicant has a *bona fide* defence. There is no evidence to show that the parties entered into an arrangement or agreement for the applicant to retain free use and enjoyment of the said motor vehicle after his resignation until his terminal benefits had been paid by the respondent. The applicant has clearly failed to provide such evidence. The evidence on record shows instead that the respondent has never waived its right to claim the motor vehicle after the applicant left the respondent's employ. It was incumbent upon the applicant to show that the respondent agreed to allow the applicant to retain and enjoy use of the said motor vehicle. Instead the evidence shows that the respondent has at all times demanded the return or delivery of the said motor vehicle.

The ownership of the said motor vehicle is not in issue. It belongs to the respondent. It is also clear that the applicant was only entitled to use this motor vehicle while in the employ of the respondent. This benefit clearly fell away upon the termination of applicant's employment contract when he resigned. The fact that the applicant is claiming terminal benefits from the respondent is neither here nor there. The respondent's claim for vindication is separate from the applicant's claim for terminal benefits. The respondent has always asserted the right to ownership of the said motor vehicle and demanded delivery of the same.

The applicant clearly accepts the position that his right to use of the motor vehicle fell away upon his resignation hence the allegation which remained unsubstantiated, that he entered into an agreement with the respondent to further extend this benefit to him after resignation until the payment of his terminal benefits.

It is common cause that the applicant has instituted proceedings before a different forum for the recovery of his terminal benefits. There is therefore no basis for the applicant to retain possession of the said motor vehicle. In fact the applicant had wisely surrendered the said motor to the respondent on 24 September 2014.

It is my considered view that this application is devoid of merit. The applicant has no *bona fide* defence. The applicant has dismally failed to make a case for rescission of the default

judgement. Consequently the application for rescission of judgement is dismissed with costs.

Wintertons legal practitioners, applicant's legal practitioners
Gill, Godlton & Gerrans, respondent's legal practitioners